Supreme Court of California
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Supreme Court of California
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S104144

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent,

v.

JOSEPH ANDREW PEREZ, JR., Defendant and Appellant.

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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	)
	)
JOSEPH ANDREW PEREZ, JR.	)
	)
Defendant and Appellant.	)
	)

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

This is a supplemental reply brief filed in accordance with this Court's August 16, 2017, order to "serve and file supplemental briefs addressing the effect of recent precedent on the hearsay and confrontation clause issues related to Brian Peterson's testimony that were raised in this appeal," citing *People v. Sanchez* (2016) 63 Cal.4th 665, and suggesting that it be compared with certain decisions reached by High Courts in various other states (Oklahoma, New Mexico, Indiana, Tennessee, Ohio, Arizona, West Virginia and Illinois.)[1]

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[1] The parties filed their supplemental briefs on September 11, 2017. This Court's order of August 25, 2017 granted one week, or until September 18, 2017, to serve and file any reply to the supplemental briefs. The time for filing this brief was subsequently extended to September 28, 2017.

Issue XVII: The trial court committed prejudicial error when it allowed inadmissible hearsay testimony from the pathologist who was not present at the autopsy.[2]

I. Introduction to the reply argument.

Despite the implication from the Court's order that the holding of *People v. Dungo* (2012) 55 Cal.4th 608 should be reexamined in light of *Sanchez*, respondent simply argues in his brief (hereafter, "RB"), based on *Dungo* and post-*Dungo* harmless error cases, that there was no error in admitting Dr. Peterson's testimony and that any error would be harmless because there was no material dispute at trial about the nature of the victim's injuries or cause of death. Respondent's failure to address the implications of *Sanchez* and the continued viability of *Dungo* is a telling admission. Moreover, respondent's prejudice argument fails to address, or even acknowledge, the discrepancy between the prior testimony of the examining pathologist and Dr. Peterson's testimony regarding the cause of death. As shown below, the arguments respondent does raise are all unavailing.

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[2] AOB at pp. 244-259; Appellant's Reply Brief at pp. 94-101; the facts supporting this issue are at pp. 244-248 of the AOB. Appellant hereby incorporates by reference the arguments made in the AOB and reply brief as to Issue XVII.

II. Respondent's arguments regarding the details and photos of the autopsy and Ojena and Peterson's testimony are of little assistance in addressing this issue, where the discrepancies between the prior testimony of the examining pathologist and the trial testimony of the prosecution's pathologist form the factual basis for the issue being raised on appeal. (RB at 6-11.)

Respondent focuses on the factual background of the murder (RB at 6-11) and Dr. Peterson's and criminalist Steven Ojena's testimony that the victim "was killed by a combination of strangulation and stab wounds" (RB at 5). The Respondent ignores the discrepancy between the prior testimony of the examining pathologist and that of the testifying pathologist, which had the effect of increasing the aggravating effect of the circumstances of the crime.

The autopsy report lists the cause of death as "ligature strangulation and Multiple Stab and Cutting Wounds." (Autopsy Report at p. 1; *see* Motion for Judicial Notice, Exhibit 1, filed contemporaneously with this brief.)[3] The report includes a section entitled, "ASSOCIATED INJURIES", where the report states: "Associated with the stab wounds to the chest there is 200 ml of fluid and clotted blood in the left pleural cavity and 400 ml of fluid and clotted blood in the right pleural cavity." (*See* Motion for Judicial Notice, Exhibit 1 at p. 7.)

When Dr. Hogan testified at co-defendant Snyder's trial, she in effect testified that the cause of death was strangulation. When asked the

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[3] Appellant is making a motion under separate cover for this Court to take judicial notice of the autopsy report in this case, which is necessary in order to understand the issue presented. *See Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1278 [an autopsy report is a public record]; see also *People v. Castillo* (2010) 49 Cal.4th 145, 157 [a court may take judicial notice of a public record when it does not consider the record for the truth of matters stated therein"].

significance of her finding of blood in the chest cavity. She replied in relevant part:

> For the extent of these injuries, I would expect more blood in the chest. So, I can't say definitively, but my opinion is that the strangulation occurred first and that her heart may have not been beating when these stab wounds occurred, based on the you know, I would expect about a thousand milliliters [of blood] with these kind of injuries.
> (Snyder RT 943-44.)

At appellant's trial, Dr. Peterson testified that he was certain, based upon the amount of blood reported in the chest in the autopsy report, that the decedent was alive at the time she was stabbed. (13 RT 3020.) Dr. Peterson was asked "[i]f your colleague, the one who performed the autopsy had said that she...in her opinion, her heart may or may not have been beating when the stab wounds occurred, you would disagree with her?" Dr. Peterson replied "Yes, I disagree with that." (13 RT 3025.) Additionally, Dr. Peterson testified that "*unequivocally*, based on the blood inside her chest....*her heart was still beating at the time those stab wounds were delivered.*" (13 RT 3020.) (Emphasis added).

Dr. Hogan's change of opinion between writing the autopsy report and testifying at the co-defendant's trial may have had to do with the circumstances in which the autopsy was performed. It may also have been related to her observations of the exact proportions of the mixture of "400 ml of fluid and clotted blood" in the chest cavity which does not seem to have been precisely recorded in the report and which cannot be seen in the photographs. Dr. Peterson's claim of certainty that the stab wounds were inflicted while the decedent was alive ignored the limits of the autopsy report and the circumstances under which the autopsy was performed, and

its effect on the evidence at trial was to increase the aggravating effect of the circumstances of the crime.

III. Respondent's arguments regarding "the confrontation right, *Crawford*, and recent cases" fail to address the effect of *Sanchez* on hearsay or confrontation rights. (RB at 11-16.)

Respondent relies on *Dungo,* but never discusses the question at issue here – whether *Dungo* is still viable in light of *Sanchez*. This is troublesome given Respondent's acknowledgment that the application of *Crawford* to autopsy reports is a thorny, open issue. (RB at 13.) Respondent merely argues that "Peterson's opinions were admissible under all recent precedents of this Court," (RB at 5, 11-16) focusing on California cases post *Dungo* (2012):

> In the aftermath of *Dungo*, this court has repeatedly held that it was harmless error for a testifying pathologist to reference the conclusions of a non-testifying pathologist when the conclusions of the two pathologists were consistent and the defendant did not dispute the actual cause of death
>
> (RB at 14, citing *People v. Edwards* (2013) 57 Cal.4th 658, 707 and *People v. Trujeque* (2015) 61 Cal.4th 227, 276-277.)

The error in *Edwards* and *Trujeque* was harmless because they involved testimony by non-examining pathologists in single-defendant cases involving uncontested factual circumstances. In *Edwards,* the decedent died from strangulation and a single defendant was charged. (*Edwards,* p. 670-674, 707 [any error was harmless because experts agreed independently and the cause of death was not in dispute at trial]). The killing in *Trujeque* involved a straightforward knife attack to the decedent's chest committed by a lone individual in front of an eyewitness and causing death within minutes. (*Trujeque*, p. 237, 275 [any error was harmless

because experts agreed independently and the cause of death was not in dispute at trial]).

Unlike the cases cited by Respondent, the error in this case was prejudicial. The autopsy was performed in the presence of a prosecutor and investigating officers; the examining pathologist testified at a co-defendant's trial to a cause of death that differs from that which she reported in the autopsy report; the prosecution presented a new expert who expressed certainty to a cause of death that differed from that testified to by the examining pathologist, and which increased the aggravating effect of the circumstances of the crime.

Respondent notes additional cases where this Court assumed error and went directly to harmless error analysis:

> the court also has found that the admission of an autopsy report created by a non-testifying pathologist is harmless error where a testifying pathologist independently reaches the same conclusion and the cause of death is not in dispute.

(RB at 14, citing *People v. Leon* (2015) 61 Cal.4th 569, 604 [error is assumed but harmless where undisputed that decedent had been shot to death and only question was identity of the shooter] and *People v. Capistrano* (2014) 59 Cal.4th 830, 874 [need not decide confrontation clause issue where expert testified to his independent assessment of the evidence in forming his opinion as to cause of death, which was undisputed]). It is significant that this Court has declined to follow or extend *Dungo* in deciding all of these cases, instead consistently resorting to harmless error analysis.

The question posed by the Court's order for supplemental briefing is what impact *Sanchez* has in this matter where, appellant respectfully submits, case specific hearsay formed the basis of Dr. Peterson's opinion as

to the cause of death, and where the examining expert and the testifying expert differed in their opinions on the cause of death, which aggravated the circumstances of the offense to the detriment of appellant. Dr. Peterson's testimony as to cause of death was based on the fluid/clotted blood mixture, which he related to the jury directly from the autopsy report. The details of the fluid/clotted blood mixture constituted case-specific hearsay for which there was no applicable exception.

Because Dr. Peterson's testimony included case-specific hearsay from Dr. Hogan's autopsy report, it violated *Sanchez* and brought into question the reasoning in *Dungo.* And because the autopsy report was part of an investigative process that robbed it of any cloak of objectivity, and because the experts disagreed on material facts relating to the cause of death, the autopsy report was a testimonial document, and admission of this evidence violated *Crawford v. Washington* (2004) 541 U.S. 36. The error was prejudicial as will be further demonstrated below.

IV. Respondent's arguments that "Dr. Peterson's testimony was permissible, unchallenged, and unremarkable" are disingenuous and inaccurate. (RB at 16-18.)

Respondent argues that Dr. Peterson's testimony was unchallenged, "unrefuted and unremarkable to the point of being unnecessary." (RB at 16.) While Dr. Peterson's testimony may not have been crucial for the prosecution to prove their case, it certainly added to the over-all aggravating effect of the evidence against appellant.

As argued in appellant's supplemental brief, objection to the basis of the expert's opinion as improper hearsay would have been futile under existing law at the time of trial. (ASB at 38) And in order to impeach Dr. Peterson, the defense would have had to call Dr. Hogan as a witness. The

prosecution's failure to call Dr. Hogan as a witness is at the heart of this issue.

V. In addition to violating *Sanchez*, appellant has previously shown that the autopsy report is testimonial, and respondent has not argued or shown that any exceptions to the confrontation clause violation apply to the autopsy report in this case.

Sanchez, 63 Cal.4th at 686 held that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay...If the case is one in which a prosecution expert seeks to relate testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." *See also Crawford v. Washington* (2004) 541 U.S. 36, 59; *Bullcoming v. New Mexico* (2011) 564 U.S. 647. Respondent has not argued or shown any prior opportunity for cross-examination of Dr. Hogan nor any forfeiture of that right by wrongdoing.

The other exception, a showing of unavailability, has also not been shown. Respondent merely asserts that "[i]t appears that Hogan was not living in California at the time of Perez's trial in 1999 (RB at 8, citing 8 RT 1968) and "[b]ecause pathologist Hogan was living across the country at the time of appellant's trial, the prosecutor called Peterson..." (RB at 17.) This is insufficient.

The prosecution bears the burden of establishing that a witness is unavailable. (*Ohio v. Roberts* (1980) 448 U.S. 56, 75.) A witness is unavailable if a witness has unexpectedly gone missing and the prosecution cannot find the witness, "despite good faith efforts undertaken prior to trial to locate and present that witness." (*Id.* at 74.) If the government has not

undertaken reasonable attempts to produce the witness, then the witness is not unavailable. (*See, e.g., Barber v. Page* (1969) 390 U.S. 719, 722-25; *Hernandez v. State* (Nev. 2008) 188 P.3d 1126 (insufficient effort on State's part when simply accepted claim at time of trial of "family emergency" and did not investigate in any way); *State v. King* (Wis. App. 2005) 706 N.W.2d 181 (insufficient effort when witness contacted several times, learned of her reluctance to appear and failed to issue subpoena); *State v. Cox* (2010 Minn.) (prosecution must actively seek the witness's participation).)

Here the State merely alleged that Dr. Hogan was "out of state." (8 RT 1968.) There was no showing that she was permanently or at least temporarily beyond the court's jurisdiction and that "the state [was] powerless to compel [her] attendance...either through its own process or through established procedures." (*Mancusi v. Stubbs* (1972) 408 U.S. 202, 208.) There was no showing that the prosecution could not find the witness or even that "good faith efforts [were] undertaken prior to trial to locate and present that witness." (*Roberts,* 448 U.S. at 74.) If the government has not undertaken reasonable efforts to produce the witness, then the witness is not unavailable. (*Barber v. Page, supra,* 390 U.S. 719, 722-25.)

The prosecution apparently knew where Dr. Hogan was, and "procedures exist[ed] whereby the witness could be brought to the trial, and [because] the witness [is] not in a position to frustrate efforts to secure [her] production," a witness outside the jurisdiction is not unavailable. (*Roberts,* 448 U.S. at 77.) Here, nothing at trial or in respondent's supplemental briefing shows that the prosecution ever made any efforts to procure Dr. Hogan, let alone to show that she could not have been procured or was otherwise unavailable to testify.

As for a third potential exception to the confrontation clause, in Appellant's Supplemental Brief it was suggested that respondent may argue

that the autopsy report, or testimony about its content, could be admitted as a business record pursuant to Evidence Code Section 1280. Notably, respondent has not invoked section 1280 as a basis for admission of the autopsy report evidence. This might be because they recognize that in the case of violent death, autopsies are part of the criminal investigative process. The Third District Court of Appeal in *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271 described how this Court long ago recognized that autopsy reports are part of law enforcement investigation:

> It is through the coroner and autopsy investigatory reports that the coroner 'inquire[s] into and determine[s] the circumstance, manner and cause of criminally-related deaths. And officially inquiring into and determining the circumstances, manner and cause of a criminally-related death is certainly part of law enforcement investigation. Our state Supreme Court recognized this fact nearly 90 years ago when it noted that 'the primary purpose of '[a coroner's] inquest under our laws is to provide a means for the prompt securing of information for the use of those who are charged with the detection and prosecution of crime.' Along these lines, the sentence in section 27491 that states "Inquiry pursuant to this section does not include *those* investigative functions usually performed by *other* law enforcement agencies" (italics added), implicitly recognizes that a coroner's inquiry encompasses an investigative function performed by the coroner as a law enforcement agency.

(*Id.* at p. 1277 [citing (*Mar Shee v. Maryland Assurance Corp.* (1922) 190 Cal. 1, 4] (emphasis in original).) See also *Davis v. Washington* (2006) 547 U.S. 813 (non-emergency law enforcement investigation evidence is testimonial).

VI. Respondent is incorrect in arguing that Dr. Peterson's testimony was based on the autopsy photos.

Lastly, respondent argues that Peterson's testimony was not based on inadmissible hearsay by emphasizing the autopsy photos (RB at 8-10) and that "the only factual information in Dr. Hogan's autopsy report that was not independently shown by the autopsy photos was the *exact* depth of some of the stab wounds." (RB at 18.) (Emphasis in original.) However, Respondent ignores other examples of case-specific hearsay related to the jury through Dr. Peterson's testimony, most significantly when Dr. Peterson testified based on case specific hearsay about the depth of a wound marked as "E" in Exhibit 103. The depth of the cut cannot be determined from the photo, and Dr. Peterson expressly relates hearsay from Dr. Hogan to describe the depth of the cut and more importantly, the amounts of fluid and clotted blood found inside the chest cavity. (13 RT 3014.) These case-specific details were read to the jury from the autopsy report, and they formed the foundation for Dr. Peterson's conclusion that the decedent was alive when stabbed.

VII. Prejudice.

Respondent argues that if there is error, there is no prejudice because "there was no material dispute at trial about the nature of Janet's injuries or the cause of her death" (RB at 5) and Peterson's testimony was "unremarkable to the point of being unnecessary." (RB at 16-18.)

As a circumstance of the offense pursuant to Penal Code Section 190.3 (a), the amount of suffering of a victim and the question in a multi-defendant case of "who did it" can mean the difference between a life

verdict and death. (*People v. Grimes* (2016) 1 Cal.5th 698, 721-722.) In this case the evidence introduced through the testimony of Dr. Peterson effectively increased the aggravating effect of the circumstances of the crime by increasing the suffering of the victim and by increasing the aggravating effect of appellant's alleged role as the stabber. Because Dr. Peterson testified to case-specific hearsay for which there was no hearsay exception under *Sanchez*, his testimony should not have been admitted. And because his testimony was based on an autopsy report which was an "investigatory file prepared for law enforcement" (*Mar Shee v. Maryland Assurance Corp.* (1922) 190 Cal. 1, 4), admission of that hearsay also violated appellant's Sixth Amendment right to confrontation. Because Dr. Peterson's testimony, which should have been excluded, had the effect of increasing the aggravating effect of the circumstances of the offense, the error was not harmless beyond a reasonable doubt as to the penalty verdict. (*Chapman v. California* (1967) 386 U.S. 18.)

CONCLUSION.

For the reasons discussed herein and in his supplemental brief, appellant respectfully requests that as to Issue XVII, this Court hold that the trial court erred in allowing inadmissible testimonial hearsay evidence from the pathologist who was not present at the autopsy (AOB at pp. 244-259; appellant's reply brief at pp. 94-101); and that the error was harmful and prejudicial and, as a result, the judgment and sentence of death must be reversed.

DATED: September 28, 2017.

Respectfully submitted,

/s/ A. Richard Ellis

____

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I am the attorney appointed by this Court to represent appellant Joseph Perez, in this direct appeal. I conducted a word count of this brief using my office's computer software (WordPerfect X8). On the basis of that computer-generated word count, I certify that this brief, excluding tables, exhibits, and certificates is 3,591 words in length.

Dated: September 28, 2017.

/s/ A. Richard Ellis
____
A. Richard Ellis
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

I, A. RICHARD ELLIS, hereby declare that I am a citizen of the United States, over the age of eighteen, an active member of the State Bar of California, and not a party to the within action. My business address is 75 Magee Ave, Mill Valley, California 94941.

On September 28, 2017 I served the within

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Mill Valley, California, on September 28, 2017.

/s/ A. Richard Ellis

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